STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 19, 2015
v	No. 320233 Wayne Circuit Court
THOMAS MARKESE HARRIS, Defendant-Appellant.	LC No. 12-008332-FC

Before: TALBOT, C.J., and CAVANAGH and METER, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm defendant's convictions, but vacate his sentences and remand for resentencing.

I. FACTS

While the victim, Julia Jones, was sitting on her front porch, defendant and another man quickly approached her. Defendant had a gun in a holster and showed it to Jones. He then forcibly removed four gold bracelets from her wrists. His accomplice stood behind on the walkway leading to the porch. The two men fled in a tan Ford Explorer. Trevail Ellis then sold the bracelets to a pawn shop near Northland Mall. Within a couple hours of the robbery, the Explorer was located at Northland Mall. Four men inside the Explorer, including defendant and Ellis, were arrested. During a subsequent corporeal lineup, Jones identified defendant as the robber with the gun who forcibly took her gold bracelets.

II. DISCUSSION

A. SENTENCING GUIDELINES

Defendant first argues that the trial court erred in scoring offense variables (OVs) 1, 4, 10, and 14, and that his counsel was ineffective for failing to challenge OVs 1, 4, and 10. While defendant is not entitled to relief with regard to his challenges to the scoring of these variables, his counsel was ineffective for failing to challenge the trial court's scoring of OV 1. Accordingly, we vacate defendant's sentences and remand for resentencing.

The scoring of OVs 1, 4, and 10 was not challenged in the trial court; thus, these challenges are unpreserved for appeal. See MCL 769.34(10); *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010). Unpreserved issues regarding the scoring of offense variables are reviewed for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). But defendant did preserve his challenge to OV 14 by raising it at sentencing. *Id*. The interpretation and application of the sentencing guidelines is reviewed de novo, while the trial court's factual determinations, which must be supported by a preponderance of the evidence, are reviewed for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). With regard to defendant's ineffective assistance of counsel claim, he failed to move for either a new trial or an evidentiary hearing in the trial court, thus, our review is for errors apparent on the record. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991).

Defendant waived his challenges to the trial court's scoring of OVs 1 and 10. Waiver is the intentional relinquishment of a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). When asked if 15 points should be assigned to OV 1, defense counsel stated, "I agree with that, that's okay." With regard to OV 10, defense counsel requested that the court assign 10 points to this variable, and the trial court agreed. By approving of the trial court's scoring of OVs 1 and 10, defendant waived any challenge to these scores, extinguishing any error. See *id*.

Defendant did not expressly approve of, or challenge, the trial court's scoring of OV 4. Thus, his challenge to the scoring of this variable is unpreserved, but not waived. See *id*. at 215-216 (distinguishing between approval, which amounts to waiver, and the failure to object, which amounts to forfeiture). An unpreserved matter is reviewed for plain error. *Kimble*, 470 Mich at 312. A trial court may consider all record evidence, including trial testimony, preliminary examination testimony, and the contents of a presentence investigation report when scoring the sentencing guidelines. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). See also *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012). The rules of evidence do not apply at sentencing, which allows the trial court to "rely on information that would otherwise not be admissible under the rules of evidence[]" when sentencing a defendant. *People v Uphaus*, 278 Mich App 174, 183-184; 748 NW2d 899 (2008).

The trial court's decision to assign 10 points to OV 4 did not constitute plain error. The trial court must assign 10 points to this variable if a victim suffers "[s]erious psychological injury requiring professional treatment." MCL 777.34(1)(a). But the victim need not have sought or received treatment. Under MCL 777.34(2), the trial court must assign 10 points "if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." If no psychological injury occurred, the trial court must assign zero points to OV 4. MCL 777.34(1)(b).

At trial, Jones testified that, while she was not afraid of guns, the presence of the gun was intimidating. She was afraid defendant might use the weapon against her. Jones's son testified that, before the armed robbery, Jones had been a business owner in Detroit who was active in her community. After the incident, Jones was much more cautious; the robbery had taken away her sense of security. She refused to go out without her husband, and could no longer sit on her porch in the evenings as she had for the past 40 years. In light of this evidence, the trial court

correctly assigned 10 points to OV 4. See *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009) ("[T]he victim's expression of fearfulness is enough to satisfy [MCL 777.34(1)(a)]."). Because no error occurred, defendant cannot demonstrate plain error. See *Kimble*, 470 Mich at 312.

Defendant's sole preserved contention of error is with regard to OV 14. This variable considers defendant's role in the crime. MCL 777.44(1). The trial court must assign 10 points to OV 14 if a defendant "was a leader in a multiple offender situation[.]" MCL 777.44(1)(a). This Court "view[s] the entire criminal episode when determining if an offender was a leader in a multiple offender situation." *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004). See also MCL 777.44(2)(a). "If 3 or more offenders were involved, more than 1 offender may be determined to have been a leader." MCL 777.44(2)(b).

Here, multiple men were involved in the crime. Two men, including defendant, approached Jones and fled together after the robbery. Defendant clearly was the leader of the attack. While his accomplice stood behind on the walkway, defendant approached Jones, displayed a gun, grabbed her arms, and physically removed the bracelets from her wrists. While it appears that a third man, Ellis, actually sold the jewelry, and might also be considered a leader, there can be multiple leaders in this instance because it appears at least three men were involved. MCL 777.44(2)(b). Based on the evidence that defendant led the robbery, the trial court's conclusion that defendant was a leader was not clearly erroneous and 10 points was properly assigned to OV 14. See MCL 777.44(1)(a).

Defendant also argues that trial counsel was ineffective for failing to object to the trial court's scoring of OVs 1, 4, and 10. To be entitled to relief, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

As discussed above, the trial court properly scored OV 4. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Counsel also was not ineffective for requesting that OV 10 be assigned 10 points. This variable considers "exploitation of a vulnerable victim." MCL 777.40. The trial court must assign 10 points to this variable if "[t]he offender exploited a victim's . . . youth or agedness . . . ." MCL 777.40(1)(b). The mere fact of a victim's age "does not automatically equate with victim vulnerability." MCL 777.40(2). As defined by MCL 777.40(c), " 'Vulnerability' means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." " 'Exploit' means to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b).

Jones was 69 or 70 years old at the time of the armed robbery. While this fact alone does not warrant assigning 10 points to OV 10, MCL 777.40(2), there was evidence that defendant exploited her apparent susceptibility to an attack. Before the robbery, Jones was sitting alone on her porch. Defendant and his accomplice walked past her home and then returned. Defendant's conduct implied that, after seeing an apparently vulnerable victim, he decided to take advantage of that vulnerability and rob her. Further, defendant used his superior strength to overcome

Jones and physically take her jewelry from her body. Accordingly, OV 10 was properly scored. Counsel is not required to advance a meritless argument. See *Ericksen*, 288 Mich App at 201.

However, trial counsel was ineffective for failing to contest the scoring of OV 1. This variable considers the "aggravated use of a weapon." MCL 777.31(1). With regard to scoring OV 1, our Legislature has distinguished between merely displaying a weapon and the type of conduct that requires 15 points to be assigned to OV 1. See *People v Brooks*, 304 Mich App 318, 322; 848 NW2d 161 (2014). A trial court must assign 15 points to OV 1 if "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabling weapon." MCL 777.31(1)(c). If a weapon was only "displayed or implied," the trial court must assign five points to OV 1. MCL 777.31(1)(e). But where the sentencing offense is a violation of MCL 750.82 or MCL 750.529, the trial court may not assign five points to OV 1. MCL 777.31(2)(e). Thus, because defendant's sentencing offense was a violation of MCL 750.529, the trial court could assign 15 points to OV 1 if defendant pointed his gun at Jones, or zero points if he only displayed the gun. See MCL 777.31(1)(c), (1)(e), (2)(e).

Jones provided conflicting testimony regarding the extent of defendant's use of his gun. At trial, Jones testified extensively regarding this issue. While her testimony vacillated at times, she ultimately testified that defendant began to take the gun from its holster, but never fully removed it before placing it back in the holster. She agreed that she had told police defendant pointed the gun at her, and defendant's presentence investigation report, which relied on the police report, stated that defendant pointed the gun at Jones. But during her trial testimony, the court noted: "And I want the record to reflect that Ms. Jones has already said he never took the gun out." In light of Jones's trial testimony, defense counsel's decision to agree to scoring OV 1 as if defendant had pointed the gun at Jones was objectively unreasonable. And there is no sound strategy for this action because there was no risk that a challenge would result in an increased OV 1 score.

If counsel had raised the objection, the trial court may well have assigned no points to OV 1 on the basis of Jones's trial testimony and, thus, a different result was reasonably likely. That is, it is reasonably likely that the trial court would have found by a preponderance of the evidence that defendant did not point the gun at Jones; rather, he displayed it. Had the court made such a factual finding, no points would have been assigned to OV 1. See MCL 777.31(1)(e), (2)(e). This would have resulted in a lower sentencing guidelines range. Because a violation of MCL 750.529 is classified as a Class A offense against a person, MCL 777.16y, the applicable scoring grid is found in MCL 777.62. Under this grid, a score of 60 to 79 points places a defendant in offense variable level IV. MCL 777.62. Defendant's total OV score was 60 points, meaning that any reduction to his total OV score would place him in a lower offense variable level. Thus, assigning zero points to OV 1 would result in a lower minimum sentencing guidelines range. See MCL 777.62.

In sum, trial counsel's agreement that 15 points should be assigned to OV 1 was objectively unreasonable and unsound strategy. It is also reasonably likely that, had counsel challenged the scoring of OV 1, the trial court would have assigned no points to OV 1, which would have lowered defendant's applicable sentencing guidelines score. Accordingly, defendant

has established that he received ineffective assistance of counsel. See *Trakhtenberg*, 493 Mich at 51. As a result, we vacate defendant's sentences and remand for resentencing.

B. FAILURE TO PRESENT WITNESSES[1]

Defendant argues that trial counsel was ineffective for failing to call four witnesses to testify in his defense. We disagree.

At trial, defendant testified that he was babysitting his sisters at the time of the robbery. He also testified that he was subjected to three lineups before he was identified by Jones. Defendant now argues that his counsel was ineffective for failing to call four witnesses whom he claims would have supported his testimony. Because this issue is raised for the first time on appeal, it is unpreserved and our review is for errors apparent on the record. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id*. at 76-77. Further, the failure to call a witness constitutes ineffective assistance only if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant first argues that his attorney should have called two alibi witnesses to testify on his behalf. Defendant attempts to establish the factual predicate for his claim with two affidavits from these witnesses, which are attached to his brief on appeal. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). But even considering these affidavits, defendant's ineffective assistance claim fails. One affidavit is from Antoine Hollyfield, who was driving the tan Ford Explorer—the vehicle that was identified as the vehicle defendant and his accomplice ran to after the armed robbery and that was subsequently located at Northland mall where the arrests occurred. According to his affidavit, Hollyfield only met up with defendant at Northland mall, and not before. That is, defendant and Ellis "walked up" to him and defendant asked if Hollyfield would give him a ride home. The affidavit does not set forth any timing of the events, but does state that defendant and Ellis, who sold Jones's stolen jewelry at a pawn shop, were in fact together after the robbery and before their arrests. Thus, defendant has not shown that Hollyfield's testimony, even assumed true, would have provided a substantial defense. Further,

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[1] This and the remaining issues were raised in a supplemental brief filed by defendant on his own behalf. Several of his arguments were not raised in his statement of the questions presented, and accordingly, are not properly before this Court. See *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008). However, as an appellant acting *in propria persona*, defendant's submissions are entitled to liberal construction. See *Estelle v Gamble*, 429 US 97, 106; 97 S Ct 285; 50 L Ed 2d 251 (1976). Despite defendant's failure to properly present his arguments, we review the arguments presented in his supplemental brief.

a second affidavit, from defendant's sister, states that defendant was babysitting her and her younger sister at the time the robbery occurred. This testimony, even if assumed true, is merely cumulative of defendant's testimony and, thus, does not provide a substantial defense. Accordingly, defendant's ineffective assistance of counsel claim premised on the failure to call these alleged alibi witnesses is without merit. Defendant's ineffective assistance claim premised on the failure to call witnesses who participated in the lineups is addressed below.

C. SUGGESTIVE LINEUP PROCEDURES

Defendant argues that the corporeal lineup at which Jones identified him was unduly suggestive and, thus, Jones should not have been allowed to identify defendant in court as the robber. Further, defendant claims that his attorney was ineffective for failing "to investigate and call" two witnesses who would have testified about the corporal lineups in which defendant was a participant. We disagree with both claims.

Because these issues were not raised in the trial court they are unpreserved. See *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). While we ordinarily review a trial court's decision to admit identification evidence for clear error, *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993), because the issue is unpreserved, we review the issue for plain error affecting substantial rights, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). And because defendant did not raise his ineffective assistance of counsel claim in the trial court, our review is for errors apparent on the record. See *Sabin (On Second Remand)*, 242 Mich App at 658-659.

An unduly suggestive lineup denies a defendant's right to due process. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). "In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Kurylczyk*, 443 Mich at 302. If a defendant has been identified in an unduly suggestive lineup, the witness may not identify the defendant in court unless the trial court finds by clear and convincing evidence that an independent basis exists for the in-court identification. *Gray*, 457 Mich at 114-115.

Defendant first asserts that Jones's identification of defendant in a corporeal lineup was tainted by an earlier improper photographic lineup, which defendant argues was improper because he was in custody at the time it was held. Because of a "distrust of photographic lineup procedures," our Supreme Court has held that it is generally improper to use a photographic lineup to identify a defendant who is in custody. *Kurylczyk*, 443 Mich at 297-298. Jones did testify that, when she first arrived at the sixth precinct station, she was presented with a photographic lineup. However, as defendant recognizes in his supplemental brief, defendant's photograph was not placed in this lineup. Accordingly, his argument that the photographic lineup violated his due process rights is without merit. And defendant's claim that he was entitled to have counsel represent him at the photographic lineup is also without merit because, again, defendant's photograph was not placed in the lineup.

Defendant also claims that his attorney was ineffective for failing "to investigate and call" two witnesses who would have testified about the suggestive nature of the lineups in which

defendant was a participant. Again, defendant attempts to establish the factual predicate for his claim with affidavits from two alleged witnesses, which are attached to his brief on appeal. See *Hoag*, 460 Mich at 6. But even considering these affidavits, defendant's claim fails. According to his affidavit, Donald Dale would have testified that he was in two lineups with defendant and no one was picked in the first lineup. During the second lineup, defendant argued with one of the police officers and then defendant and Dale were identified as the perpetrators. Similarly, according to the affidavit of Eric Sullivan, he was in two lineups with defendant. During the second lineup, defendant argued with one of the police officers and then defendant and another guy were identified as the perpetrators.

Contrary to defendant's claim, even if assumed true, the asserted testimony by Dale and Sullivan would not have shown that the identification procedure led to a substantial likelihood of misidentification and would not have provided defendant with the substantial defense of misidentification. See *People v McDade*, 301 Mich App 343, 357; 836 NW2d 266 (2013); *Dixon*, 263 Mich App at 398. According to both affiants, defendant was identified as one of the perpetrators of the robbery. Further, Jones testified that she participated in two corporal lineups, at two different police stations. She made no identification at the first lineup because of difficulty seeing through the separation glass and the poor lighting. At the second lineup, Jones almost immediately identified defendant as the perpetrator. According to Sergeant Metiva, Jones selected defendant "within seconds." And even if defendant was in an argument with a police officer before he was identified by Jones, defendant has failed to show that such an event would cause the identification procedure to be so impermissibly suggestive that it led to a substantial likelihood of misidentification considering the opportunity Jones had to view the perpetrator who was physically taking her bracelets off of her wrists and the short length of time between the armed robbery and the lineup. See *Kurylczyk*, 443 Mich at 302, 306. Accordingly, defendant's claims related to the lineup procedure, including his ineffective assistance of counsel claim, are without merit.

D. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the prosecutor did not present sufficient evidence to support his convictions. We disagree.

This Court reviews de novo a defendant's challenge to the sufficiency of the evidence. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). We review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements proved beyond a reasonable doubt. *Id*. at 175. Circumstantial evidence and reasonable inferences drawn from that evidence can be sufficient to establish the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of armed robbery are:

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person

> present to reasonably believe that the article was a dangerous weapon, or represented orally or otherwise that he or she was in possession of a dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

Jones testified that defendant approached her, displayed a gun, and forcibly removed four bracelets from her wrists. This testimony was sufficient to establish the elements of armed robbery.

In a related argument, defendant argues that it was improper for the trial court to instruct the jury that it could convict defendant of armed robbery even if defendant did not actually possess a weapon, so long as Jones reasonably believed defendant was armed. Defendant waived this argument. When asked if he was satisfied with the jury instructions, defense counsel stated, "Yes, Your Honor." Counsel's express approval of the jury instructions waived any error. *Carter*, 462 Mich at 215. Further, the trial court's instruction was accurate. See MCL 750.529.

Defendant was also convicted of felony-firearm. A defendant may be convicted of felony-firearm if he or she possesses a firearm while committing or attempting to commit a felony. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2 645 (2000). See also MCL 750.227b. Armed robbery is a felony, MCL 750.529, and Jones testified that defendant was in possession of a gun when he committed the robbery. This evidence satisfied the elements of felony-firearm. See *Burgenmeyer*, 461 Mich at 438.

Defendant also argues that there was insufficient evidence of his identity as the person who robbed Jones. Identity is an element of every crime. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Jones identified defendant in a corporeal lineup conducted shortly after his arrest, and at trial. She recognized defendant from his facial features and tattoos. Circumstantial evidence further supported defendant's identity as the man who robbed Jones. Shortly after the robbery, defendant was found with a large amount of cash, in the same Explorer that was used to flee from the robbery, and with the man who sold Jones's bracelets to a pawn shop. From this evidence, a rational juror could conclude that defendant and his accomplice fled in the Explorer, and that the money found in defendant's possession was a portion of the proceeds from the sale of Jones's jewelry. This evidence was sufficient to establish defendant's identity as the man who robbed Jones. Further, although defendant points to several alleged discrepancies between Jones's initial description of the robber to police and defendant's actual appearance, it was for the jury to weigh the evidence and determine the credibility of witnesses and we will not interfere in that regard. See *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012) (citation omitted). Accordingly, defendant's challenges to the sufficiency of the evidence are without merit.

Defendant's convictions are affirmed, but we vacate his sentences and remand for resentencing. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter